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THE FUTURE OF COLLECTIVE LABOUR LAW IN EUROPE

FRANK HENDRICKX*

Abstract

Since quite some time, academic labour law debate has been focusing on existential questions, concerning the future and the role of labour law. In Europe, this major questioning and re-thinking of labour law has recently been brought under the rubric of 'modernisation of labour law', a wording used in the European Commission's Green Paper of 22 November 2006. This contribution argues that, in this 'modernisation' debate, the role of collective labour law should not be overlooked. It addresses the questions whether collective labour law still has a future and whether the European Union can give a future to collective labour law. These questions are answered in the context of the current challenges of the collective labour law dimension and the developing role of Europe in this field.

Keywords: challenges; collective labour law; modernization; role of the European Union

1. INTRODUCTION

Since about a decade, academic labour law debate has increasingly been focusing on existential questions, such as: What is the future and the role of labour law? Is labour law threatened by de-regulatory aspirations of the free market? Should labour law become more flexible? Can national labour law survive?

Some of these questions have been there for a longer time. But this major questioning and re-thinking of labour law has been invigorated, and recently been brought under rubrics like the 'modernisation of labour law',¹ the 'boundaries and

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¹ European Commission's Green Paper on Modernising Labour Law (2006), COM (2006) 708 final, 22 November 2006.

frontiers of labour law² or the ‘future of labour law’.³ To use the words of Silvana Sciarra, these are different “metaphors” to characterise the debate that calls on labour law scholars around the world.⁴

Within the European Union, the debate is illustrated by the European Commission’s Green Paper on Modernising Labour Law (2006).⁵ In November 2006, the European Commission launched its broad public debate through this Green Paper ‘to meet the challenges of the 21st century’. The consultation was an important part of the EU’s Social Agenda 2005–2010 and connected with several other Commission initiatives on the wider topic of flexicurity. The public consultation on the Green Paper has produced quite an extensive response. Reactions have been received from national authorities, trade unions and employers’ organisations, as well as legal experts, non-governmental organisations, enterprises and the general public. The Green Paper embodies, implicitly, the academic labour law debate developed since some years throughout Europe and the world.⁶ It also embodies the very intriguing debate on the identification of the European Social Model and the role of the EU in labour law.

In this ‘modernisation’ debate, the role of collective labour law should not be overlooked. Very often, the focus is on employment law, the regulation of individual employment contracts, or labour market law. The European Commission’s Green Paper has been criticized, for example, for not sufficiently addressing the issue of collective labour law in the context of ‘modernisation’, although the social partners are to be seen as receiving an important role in implementing flexicurity strategies. In this contribution, the focus is on the collective dimension of labour law. It addresses the questions: Does collective labour law have a future? Can the European Union give a future to collective labour law?

From this perspective, this contribution is structured as follows. In the first section, an analysis is given of the challenges of the collective labour law dimension. In a second section, the role of Europe in this collective dimension is highlighted. From this, some conclusions will be drawn.

With the writing of this contribution, certain limits were involved. The aim has not been to provide an in-depth and overall discussion of the subject. The contribution is,

² Cf. G. Davidov and B. Langille (eds.), *Boundaries and frontiers of labour law*, Oxford, Hart, 2006, 413 p.

³ Cf. C. Barnard, S. Deakin and G. Morris (eds.), *The future of labour law. Liber Amicorum Sir Bob Hepple QC*, Oxford, Hart Publishing, 2004, 320 p.; J. D. Craig and S. M. Lynk (eds.), *Globalization and the Future of Labour Law*, Cambridge University Press, 2006, 498 p.

⁴ Cf. S. Sciarra, ‘Modernization of labour law: a current European debate’, Public Lecture at the ILO, International Institute for Labour Studies, Geneva, March 2007, p. 4 (available at www.ilo.org).

⁵ COM (2006) 708 final, 22 November 2006.

⁶ “The reader of the Green Paper, however, could be amazed most of all not to find in it specific traces of the analysis carried on in academic research”, S. Sciarra, EU Commission Green Paper ‘Modernizing labour law to meet the challenges of the 21st Century’, *Industrial Law Journal*, 2007, Vol. 36, No. 3, 378.

therefore, intrinsically incomplete. It is designed to foster a debate about the future of labour law in Europe, focusing on collective labour law, and aims to give some useful insights in this respect.

2. THE CHALLENGES FOR COLLECTIVE LABOUR LAW

Labour law has been traditionally built up on the underlying assumption of an employment relationships with lifetime or long-term security with the same employer. This has been fitting well with a right to long-term employment or legal job security. It also stems with the classical idea to view labour law as addressing the inequality of bargaining power between the contracting parties in the employment relationship, or as serving as a *corrigendum* of the free market place. Labour law also traditionally addresses the inequality built in the subordinate relationship, organised through the will of the parties to the employment contract, although this may be seen as an exponent of the power relationships existing in a free market.⁷ This is labour law as inequality compensation.⁸ Without being naïve and blind to the inequality of bargaining power on the labour market, it should be possible to require that labour law is assessed in light of new challenges and new environments, which identify labour law itself as a challenge. This is taken from the view that labour law needs to adapt.

In its traditional formula, labour law may have worked well in an industrial setting. This classic idea of industrial relations – often labelled as ‘Fordism’ – brings forward elements such as: a male full-time breadwinner; long-term service in the same firm, doing one or similar jobs; homogeneous and standardised working style; clear-cut separation of working time from leisure or private time; relatively short term of life expectancy; predominantly industrial unionism and collective bargaining.⁹

But the ‘modernisation’ or ‘future’ debate pushes labour law further in the what is called the crisis of the traditional socio-economic regulatory model, as described by Supiot:¹⁰ “Important national differences aside, that industrial model may be ideally or typically described as a regulatory framework which depends on a standardized form of subordination, the widespread nuclear family and the institutionalization of the parties who have an interest in collective bargaining, all within a national state.”

⁷ Cf.: “Any influence on another’s behaviour was justified because they were freely accepted by the persons now subjected to this power”, H. Collins, *The law of contract*, London, Weidenfeld and Nicolson, 1986, 12.

⁸ Cf. L. Betten and M.G. Rood (eds.), *Ongelijkheidscompensatie als roode draad in het recht. Liber Amicorum voor Prof. Mr. M.G. Rood*, Deventer, Kluwer, 1997, 392 p.

⁹ T. Iwagami, ‘The end of the classic model of labor law and Post-Fordism’, *Comp. Lab. L.J.*, 1999, 691–692.

¹⁰ A. Supiot, *Beyond Employment*, Oxford University Press, 2001, 215.

2.1. THE TRIANGLE WORK-WORKER-STATE

The assumption in this contribution is that collective labour law traditionally operates in a three-dimensional world, composed of: work, worker and state. And it is precisely in this triangle “work – worker – government”, that the changing industrial world bears its influence. It would then not appear odd that the driving forces behind ‘the change’ seem to be running contrary towards a traditional collective approach of labour law and defining collective labour law as a challenge.

The world of work is, indeed, changing. Main factors of change are globalisation, new technologies, services and individual consumer oriented and capitalist driven markets.¹¹ This causes businesses to stay internationally competitive, and to be responsive to changes that occur on the market.

The effects on labour relations and labour markets, and consequently on labour law, can be seen to be relevant for the three main actors in industrial relations: work, the worker and the state.

Work: Businesses (employers) are looking for means to adjust and readjust work and the workplace. The result is a quest for flexible work patterns and the rise of contingent employment, non-standard forms of work (fixed-term, part-time), outsourcing operations, and the growth of triangular employment relationships. In such context, the traditional work place would seem to be weakening.

Worker: Not only is, in the growing complexity of modern economies with individual consumer preferences, the hierarchical and pyramidal enterprise structure, loosing out. Small scale units, teams and cooperation with individual expertise are becoming driving forces of business. The hypothesis grows, therefore, that workers will belong to an ever larger, ‘atomised’, unrepresented workforce. This poses a challenge to the collective element in labour relations, the organising capacity of workers and solidarity. Furthermore, in a global context, union density is falling.¹² As capital mobility increases globally, pressures on union bargaining and unilateralism do increase. Workers may start to identify different ways of how their interests can be asserted. Super-capitalism may have an effect on systems of workplace democracy.¹³

Furthermore, there is a general trend of individuality and diversity in societies. On the one hand, individuals are building up other views and relationships towards work. Not only income stands central, but also the view that work is a way for personal development. On the other hand, there are demographic changes in our Western societies. This has an effect on welfare systems, indirect labour costs, and the

¹¹ R. Blanpain, ‘The world of work in the XXI Century. From globalisation to flexicurity’, in F. Hendrickx (ed.), *Flexicurity and the Lisbon Agenda*, Antwerp, Intersentia, 2008, 1–19.

¹² Belgium is still an exception.

¹³ Cf. R. Reich, *Supercapitalism, The Transformation of Business, Democracy, and Everyday Life*, New York, Knopf, 2007, 272 p.

participation of older workers in the labour market.¹⁴ Another factor in demographic change is the increased international mobility of people, migration and diversity of societies. This challenges labour markets' aspirations of openness, diversity and non-discrimination.

State: The power of the state as level of intervention in labour relations, is eroding in a global context. Furthermore, the power may also shift away from governments to other actors. The balance between state and international or non-state elements may tilt in favour of the latter two (with the rise of multinational companies issuing corporate codes of conduct, soft law interventions and regional integration strategies as exponents), especially in a global space with high capital mobility. This poses the question as to which level of political intervention or industrial activity, labour law should be further considered and developed. It also poses the question on how to deal with so-called regulatory competition and the "race-to-the-bottom".

2.2. DECREASING ROLE OF THE NATION-STATE

Globalisation is a key component of the new world of work, going along with an ever increasing use of new technologies, super-capitalism, mobility and migration of persons and businesses. A 'global workplace' has become reality. This means that the national and international regulation of labour has become interlocked.¹⁵

Harry Arthurs has posed the intriguing question: "who is afraid of globalisation?" – and his answer is: "just about everyone, if they have any sense".¹⁶ This *boutade* would merely seem a translation of the current concerns: businesses receive increased, global, economic competition; countries deal with regulatory competition (with the danger of creating a "race to the bottom"); workers are confronted with networks and chains of decision lines; unions suffer with attempts for global strategies and solidarity. Behind this, there are elements of uncertainty, and of control (or absence thereof as the recent economic and financial crisis has shown). We, indeed, lost the comfort of our traditional geographical boundaries.

Globalisation is a shifting and dynamic concept and, therefore, a definition is always problematic. According to the report of the World Commission on Fair Globalisation, the key characteristics of globalisation can be described as follows: "It is widely accepted that the key characteristics of globalization have been the liberalization

¹⁴ R. Blanpain and M. Weiss (eds.), *Modernisation of Labour Law and Industrial Relations: The Age Factor* in: *Changing Industrial Relations and Modernisation of Labour Law*. Liber Amicorum in Honour of Professor Marco Biagi", Kluwer Law International, 2003, p. 43–58.

¹⁵ E. Gravel and Q. Delpach, 'Notes, debates and communications. International labour standards: recent developments in complementarity between the international and national supervisory systems', *International Labour Review*, Vol. 147, No. 4, 2008, 403.

¹⁶ H. Arthurs, 'Who's afraid of globalization? Reflections on the future of labour law', in J. D.R. Craig and S.M. Lynk, *Globalization and the future of labour law*, Cambridge University Press, 2006, 51.

of international trade, the expansion of FDI, and the emergence of massive cross-border financial flows. This resulted in increased competition in global markets. It is also widely acknowledged that this has come about through the combined effect of two underlying factors: policy decisions to reduce national barriers to international economic transactions and the impact of new technology, especially in the sphere of information and communications.”¹⁷ Marleau has indicated that, in a narrow sense, globalisation can be seen as “a particularly advanced state of cross-border economic interdependence”, while in a broader sense, it can be viewed as “a process of progressive interdependence driven by factors that bring societies and citizens closer together, and by policies, institutions and private initiatives that support the integration of economies and countries”.¹⁸

For collective labour law, there are main challenges resulting from globalisation. Both the national state as regulator as well as the autonomous actors of collective labour law (such as unions) are losing grip on cross-border trade, services and mobility. The question was already seen by Albert Thomas, the first Director of the International Labour Office, writing in the first issue of the *International Labour Review*: “How far can international control be harmonized with national sovereignty?”¹⁹

There seems to be a positive and a negative side in this question.

First, and positively speaking, the phenomenon of globalisation and the creation of the global workplace would require to address labour issues at a global level and would introduce the idea of transnationalism of labour law. For some scholars, “national labor law can at most be considered a local, and thus increasingly relative, if not insufficient, response to phenomena of global change”.²⁰ There is, in other words, a growing relevance of legal intervention and action on a level above the state.

Second, and negatively speaking, it could be argued that globalisation creates imbalances between the economy, society and the polity. While the economy is becoming increasingly global, social and political institutions remain largely local or national. In this context, nationally oriented legal and institutional pathways are not always providing suitable solutions for cross-border. This tension between national ‘systematic behaviour’ of labour law and cross-border mobility of economic forces is, for example, shown in the European integration process. A typical downside scenario in this context, is the phenomenon of social dumping or regulatory competition. “Regulatory competition leads non-labour groups to oppose labour regulation on the

¹⁷ World Commission on the Social Dimension of Globalization, *A Fair Globalization. Creating Opportunities for All*, Geneva, International Labour Office, 2004, 24 (www.ilo.org).

¹⁸ V. Marleau, ‘Globalization, decentralization and subsidiarity’, in J. D.R. Craig and S.M. Lynk, *Globalization and the future of labour law*, Cambridge University Press, 2006, 110–111.

¹⁹ A. Thomas, ‘The International Labour Organisation. Its origins, development and future’, *International Labour Review*, Vol. 1, No. 1, 1921, 6.

²⁰ B. Caruso, ‘Changes in the workplace and the dialogue of labor scholars in the “global village”’, *Comparative Labor & Policy Journal*, 2007, Vol. 28, 507.

ground that business flight hurts them. Thus regulatory competition can trigger a downward spiral in which nations compete with each other for lower labour standards while labour, having lost its historic allies at the domestic level, is thus rendered powerless to resist. Globalization could be an impetus toward international labour solidarity and cooperation, but without meaningful international labour standards, it can pit labour organizations in one country against those in another”.²¹ It is clear that unions are engaged into following the logic of the state and are forced into ‘bargaining competition’, for example in the context of delocalization of companies or transnational business reorganisations.

Conclusively, to be examined is whether new modes of regulation,²² mechanisms or institutions are to be addressed, complementary to, or in substitution of, traditional modes of labour law. This brings us to the new possibilities and challenges of collective labour law against the background of globalization.

2.3. DECREASING ROLE OF THE COLLECTIVE

A decreasing importance of “the collective” in the field of labour law, seems to run parallel with various developments.

Flexibilisation increases employers’ incentive to avoid unions because they are perceived as promoting rigidity, uniformity, job protections, and narrow job definitions. Globalisation increases employers’ desire to avoid unions and labour regulations in their quest for lower labour costs. In addition, global production chains, enhanced transportation and communication, and lower trade barriers give employers considerable leverage to avoid unions altogether, or limit their effectiveness where they exist. Smaller business units and privatisation foster policies that have diminished legal protection for union rights and collective bargaining and have contributed to rapidly growing income inequality.

This has a huge impact on the collective dimension of labour law.

We call this the collective dimension of labour law instead of collective labour law. Collective labour law is usually defined as a sub-field of labour law, addressing the legal relationship between a collectivity of workers on the one hand and a single employer or a collectivity of employers on the other hand, including freedom of association, collective bargaining, collective action, worker involvement. The idea of collectivism in labour law would, however, go somewhat further. Statutory intervention in the field of labour law is also a form of a collectively setting of standards and conditions of work. It calls on a wide set of default rules, mostly of a non-negotiable and mandatory

²¹ K. V.W. Stone, *Comparative Labor & Policy Journal* 2007, Vol. 28, 572.

²² Including hard and soft law, labelling, public and private codes of conduct, international framework agreements; J.-M. Servais, ‘International labour standards and corporate social responsibility’, *Bull. Comp. Lab. Rel.* 2005, Vol. 55, 21–35.

nature, but sometimes interchangeable with collectively bargained agreements. The collective dimension of labour law involves thus the parties themselves as well as governments.

The collective agreement is, as an instrument, very often related with the era of Fordism, i.e. with traditional industrial settings. Collective bargaining often bears strong, almost physical, relationships with the way how industries and workplaces are organised.

The new models of the world of work seem to support the hypothesis of a decentralisation of collective bargaining.²³ Scholars describe new functions of decentralised national bargaining systems in Europe with, as opposed to its traditional role in redistributing income and the control of work, responsibility for handling company crises, the reorganisation or adjustments of enterprises (e.g. temporary economic unemployment) and assisting company branch transfers, or granting derogations from the standard treatment in order to save jobs (cf. financial and economic crisis management – redistribution of working time), or partnership governance (cf. social pacts), or rationalisation of the treatment of all those who are involved in a network of enterprises, like standard workers, suppliers, and self-employed.²⁴

The increasing complexities and transnational dimension of the (labour) market has also led to the possession of new levels, functions and modes of interaction in collective partnership.²⁵ There is an increased importance in European sectoral bargaining, in transnational company bargaining, taken within European Works Councils settings, and even in international bargaining. The regulation of collective bargaining would seem to not only address the collective agreement, but is becoming more complex than this. Social partnership may even evolve towards what is called ‘governance’ of industrial relations. This also involves questions on the interaction between all these more refined sources of labour law (between hard law, autonomous law, soft law).

Also the European Commission has emphasised the role of collective labour law and the involvement of social dialogue in new labour law and industrial relations issues, for example in the area of flexicurity: “Active involvement of social partners is key to ensure that flexicurity delivers benefits for all. It is also essential that all stakeholders involved are prepared to accept and take responsibility for change”.²⁶

²³ B. Gernigon, A. Otero and H. Guido, ‘ILO principles concerning collective bargaining’, *International Labour Review*, Vol. 139, No. 1, 2000, 33.

²⁴ Cf. B. Caruso, ‘Changes in the workplace and dialogue of labor scholars in the “global village”’, *Comp. L. & Pol. J.*, Vol. 28, 2007, 534–535.

²⁵ Cf. Y. Suwa, ‘The actors of collective bargaining: is the system really sustainable in the future?’, *Bull. Comp. Lab. Rel.* 2004, Vol. 51, 23–34.

²⁶ European Commission, *Towards common principles of flexicurity*, COM (2007)359final, 8.

Another important effect of the 'new work order' is the impact on trade union activity, conflict resolution and in particular the right to collective action. There are challenges on various fields.

The issue of transnational union coordination and solidarity is relevant in a globalised economy, but it remains clear that transnational unionism is hampered by various reasons. Basically, unions have different powers, restrictions, and vested rights and interests in different national legal systems and it remains difficult for unions to be really able to represent and mobilise workers in several countries.²⁷

A more fundamental problem may also lie in union attitude of the 'new working – or labour market – population' and representativeness of unions. Bellace has indicated that, due to the changing world of work, the goals and effects of existing labour laws need to be reconsidered and what is needed is that this exercise takes care of a working population that is ever more diverse, more individual, less unionised, more cooperative and managerial, and less willing to use or consider the use of the strike weapon in an employment setting.²⁸ Also Harry Arthurs has tried to indicate that globalisation is not only a phenomenon with physical effects in reality, but also a mind-set and an orientation towards a more neo-liberalised view on market forces.²⁹ It could be assumed that, combined with union membership decline, this also undermines the support, both in Courts as well as political settings, for strong collective action. In such a context, a proportionality test of collective action finds good soil.

Against this background, a particular challenge for unionism is cross-border union action in light of cross-border employment and service provision. In the European Union, this is shown in the 'conflict' between the right to collective action and the freedom of services, as displayed in the reference cases of *Viking*³⁰ and *Laval*.³¹ The European Court of Justice has adopted the view that the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of Community law, the observance of which the Court ensures. But the Court does not, however, provide immunity for the right to take collective action in the context of the internal market freedoms. This ends up with a proportionality test of strike action in light of the freedom of services and establishment.³² In addition, by

²⁷ K.V.W. Stone, 'A new labor law for a new world of work: the case for a comparative-transnational approach', *Comp. L. & Pol. J.* 2007, Vol. 28, 580.

²⁸ J. Bellace, 'The future of employee representation in America: enabling freedom of association in the workplace in changing times through statutory reform', *University of Pennsylvania Journal of Labor and Employment Law*, Vol. 5, 2002–2003, 1–32.

²⁹ H. Arthurs, 'Reinventing labor law for the global economy: the Benjamin Aaron lecture', *Berkeley Journal of Employment and Labour Law*, 2001, Vol. 22, 271.

³⁰ *Viking*, C-438/05, ECJ 11 December 2007, E.C.R. 2007, I-10779.

³¹ *Laval*, C-341/05, ECJ 18 December 2007, E.C.R. 2007, I-11767.

³² A. Davies, 'One step forward, two steps back? The Viking and Laval cases in the ECJ', *Industrial Law Journal* 2008, Vol. 37, 146.

rejecting certain member state solutions, this case law has also put national industrial relations systems – and the autonomy of collective bargaining in member states – under a lot of strain.

This trend can be particularly emphasised in a context in which states are engaged in system competition, in order to keep or attract investment in their territories. This may lead to a preference of mediation and conciliation services, or a better compliance monitoring of labour standards (e.g. social inspection services), over more or less adversarial union action.³³ Some argue that the challenge is to provide a legal framework to make unions behave in a way that is socially and politically valuable.³⁴

It is, furthermore, also important to examine the relationship between collective action and the preventive effect of worker involvement structures. The hypothesis here is that if a new workforce becomes less interested in being unionised, and if strong union action is to be avoided, the role of worker involvement (with information, consultation, co-decision rights) would need to be revised (and quite likely strengthened), as well as the role of unions herein.

2.4. IS THERE A NEED FOR COLLECTIVE LABOUR LAW? NORMATIVE FRAMEWORKS

A question, following the analysis from above, is whether ‘the collective’ will withdraw from labour law, as a consequence of which it would not play a significant role anymore in the labour law discourse of the 21st Century. This brings the normative question to the forefront. Is there a need for collective labour law? Should there be collective labour law?

There is no room in this contribution for a strong elaboration of normative frameworks. But a few considerations in this respect appear relevant. Besides more traditional normative concepts, such as ‘equality’, ‘solidarity’ or ‘social justice’, collective labour law may also be underpinned by new waves that attempt to found labour law in a capabilities approach,³⁵ in which social rights may be seen as ‘institutionalised capabilities’. As indicated by Deakin and Wilkinson, social rights should then be understood “as institutionalised forms of capabilities which provide individuals with the means to realise the potential of their resource endowments and thereby achieve a higher level of economic functioning”.³⁶ The step towards collective labour law is quite conceivable. As a matter of fact, within the capabilities approach

³³ Cf. N. Bruun, ‘The autonomy of collective agreement’, *Bull. Comp. Lab. Rel.* 2003, Vol. 48, 15–16.

³⁴ W. Brown and S. Oxenbridge, ‘Trade unions and collective bargaining’, in C. Barnard, S. Deakin and G. Morris (eds.), *The future of labour law. Liber Amicorum Sir Bob Hepple QC*, Oxford, Hart Publishing, 2004, 74.

³⁵ Cf. A. Sen, ‘Work and rights’, *International Labour Review*, 2000, 119.

³⁶ S. Deakin and F. Wilkinson, *The law of the labour market*, in *Oxford Monographs on Labour Law*, Oxford, 2005, 347.

the notion of ‘collective capabilities’ becomes apparent. It departs from the idea that “gaining the freedom to do the things that we have reason to value is rarely something we can accomplish as individuals”.³⁷ This supports the view that collective labour rights are vehicles for the realisation of individual rights, freedoms and aspirations.

About this ‘capabilities approach’, a lot can be said. A capabilities approach cannot be considered as a stand-alone view on modernising labour law and it is, perhaps, an insufficient normative framework of the (re)formulation of labour rights. To be followed is the argument of Davidov, saying that as long as employees “submit themselves to a relationship with democratic deficits”, and “old-but-updated” version of labour law can (should) be defended.³⁸ He seems to use this to reflect the concern for ‘old values’ in addressing the need to re-institutionalise the employment relationship or re-conceptualise social rights in market regulations, specifically in light of globalisation, economic restructuring, and the fall of the standard employment relationship.³⁹

An increasingly relevant hypothesis seems to be that a capabilities approach needs to be connected with a fundamental rights approach of labour law. Some scholars already argue that “one of the virtues of the concept of capabilities is that it makes social rights compatible with the market and with civil rights”.⁴⁰ It can indeed be argued that a context in which labour law is under pressure from globalisation and flexibilisation, with an emphasis on reflexive law and soft law, the ‘constitutionalisation’ of labour relations must be brought back at the forefront.⁴¹ In the words of Rood: “there seems to be a desire to find new solutions for new situations, to look for a greater flexibility without giving up the essential requirements of labour law respecting the human dignity of the worker.”⁴² The idea goes hand in hand with the notion of ‘social citizenship’, defended as a central concept in the modernisation of labour law.⁴³

The language and logic of human and fundamental social rights is, indeed, increasingly being used in the field of labour law, also in its collective dimension. Recall can be made, at a global level, to the ILO 1998 Declaration of Fundamental Principles and Rights at Work, and, at a regional level, the European Social Charter

³⁷ P. Evans, ‘Collective capabilities, culture and Amartya Sen’s Development as Freedom’, *Studies in comparative international development*, Vol. 37, N°2, 2002, 56.

³⁸ G. Davidov, ‘Notes, debates and communications. The (changing?) idea of labour law’, *International Labour Review*, Vol. 146, No. 3–4, 2007, 318.

³⁹ Cf. B. Langille, ‘Core labour rights – The true story’, *Eur. J. Int’l. L.*, Vol. 16, 2005, 409.

⁴⁰ Cf. J. Fudge, ‘The new discourse of labour rights: from social to fundamental rights?’, *Comp. LL. & Pol. J.*, 2007, 57.

⁴¹ R. Dukes, ‘Constitutionalizing employment relations: Sinzheimer, Kahn-Freund, and the role of labour law’, *Journal of Law and Society*, Vol. 35, N° 3, 2008, 342, 361–363.

⁴² M. Rood, ‘Internationalization: a new incentive for labour law and social security law’, in *Labour law at the crossroads: changing employment relationships. Studies in honour of Benjamin Aaron*, The Hague, Kluwer Law International, 1997, 149.

⁴³ A. Supiot, ‘The transformation of work and the future of labour law in Europe: a multidisciplinary perspective’, *International Labor Review* 1999, 31–46.

(1961, 1996), the increasingly relevant European Convention on Human Rights (1950), the EU Charter of Fundamental Social Rights (2000), and the concepts of “decent work” (ILO), “good work” (EU) and “fair globalisation” (ILO). It supports the view of Deakin who observed that “legal and constitutional mechanisms are increasingly being used to assert social claims”.⁴⁴

In this context, the question arises where Europe and European labour law, are standing.

3. EUROPEAN COLLECTIVE LABOUR LAW: FROM POLICY TO LAW

From the above, it can be concluded that the European level of attention gains importance in the ‘future of (collective) labour law’ debate. Within the revitalisation of collective labour law discussion, the proposition is that globalisation has an impact on the role of the national policy maker and legislator. Moreover, due to a changing industrial relations environment, the pressure on collective labour law is presumed to increase. Seen the normative references indicated above, and the recourse to fundamental social rights mechanisms in developing social claims, it can therefore be assumed that there is room for the development of collective labour law at the European Union level. However, it is well-known that this might be not that evident. Labour law, and collective labour law in general, receives a rather piecemeal approach in the EU. The ‘European Social Model’ lacks a consistent capacity to have an overriding influence over EU Member States.

Nevertheless, collective labour law at European Union level must be viewed in its dynamic context of development. In principle, collective labour law receives an important place in policy views. Although European (collective) labour law resulted from specific steps of EU social policy development, over the years, the pathways clearly took a step from policy to law and, perhaps, further European steps are required or desired. This will be explained in the following paragraphs.

3.1. COLLECTIVE LABOUR LAW ‘POSITIONED’ IN EU SOCIAL POLICY

When looking at the role of the European Union in the area of collective labour law, the specific nature of the European integration project should not be overlooked. Although a political and legal area has come into existence at the transnational European level, the predominant position of member states is still prevalent in so far

⁴⁴ S. Deakin, ‘Social rights in a globalised economy’, in Ph. Alston (ed.), *Labour rights as human rights*, 2005, 52.

as socio-political choices are being concerned. Within the European Union, many parts of labour law are primarily a Member States' affair.

On the other hand, within European social policy the collective dimension receives an important place as a matter of principle. The role of the social partners and, in particular, the European social dialogue, is seen as 'key' in the European social model. In the European Commission's Renewed Social Agenda "the European Social Dialogue, one of the cornerstones of the European social model, has an essential role in EU policy making."⁴⁵ In principle, there should thus be strong EU policy attention to the collective dimension of labour law.

However, it remains a fact that a European approach of collective labour law remains a challenge. It is known that collective labour law is narrowly linked with national, historical, institutional and even cultural factors in the Member States. A harmonised European initiative seems quite unlikely at present or in the near future. The EC Treaty does not seem to support much legal intervention either. It is well-known that Article 137 of the EC Treaty excludes the right of association, the right to strike or the right to impose lock-outs.

One may wonder whether a harmonised European collective labour law approach is a mere utopian concept. The reference to harmonisation in Article 136 of the EC Treaty remains interesting. In the early years of European policy harmonisation was, indeed, a realistic notion, seen the relative compatibility of the then existing labour and welfare systems of the six founding member states, which were only in an early stage of modernisation and development, and not yet as elaborated as in current times.⁴⁶ The general resistance against harmonisation came specifically in the second half of the 1980s. Harmonisation became a distant notion and was replaced by the rather soft concept of 'avoiding of unacceptable levels of divergence'. The further debate in European social policy, with the 1990s and the new millennium, with the increasing globalisation and the enlargement of the Union, were then more directed towards flexibility, later flexicurity, and the avoidance of social dumping. Nowadays, a traditional concept of harmonisation is much further away from the ambit of European labour law and social policy, although in some European policy documents the idea of building towards an active welfare state can be found.⁴⁷ Still, the Lisbon Treaty itself, like the current EC Treaty, confirms that the functioning of the internal market will favour the harmonisation of social systems.⁴⁸ The question is: where does this leave us?

⁴⁵ Renewed Social Agenda, COM(2008) 412 final, p. 16.

⁴⁶ F. W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, MPIfG Working Paper 02/8, July 2002, 25 p.

⁴⁷ Presidency Conclusions, Lisbon European Council, 23–24 March 2000, SN100/00, 8.

⁴⁸ Article 151 of the Treaty on the functioning of the EU, as introduced by the Lisbon Treaty of 13 December 2007, *O.J. C* 155/74, 9 May 2008.

3.2. COLLECTIVE LABOUR LAW 'CONSTITUTIONALISED'

The above shows that the idea of collective labour law, especially the role of social partnership, stands quite central in EU social policy. But this cannot cover the absence of a strong hard-way-harmonisation of labour law in Europe. It implies that the social policy options to move ahead are limited. It would seem, in fact, that there are (and in reality there have been taken) two main options.

The first is the management of diversity, by harmonising goals instead of means. This has come with the growing idea to shift from hard law to soft law. There is great value in making European directives in the area of labour law. But they also have shown that there can only be limited hard regulation of European labour law in matters in which deeply rooted member states' traditions are still likely to prevail. Furthermore, hard law measures may not be well adapted for multidisciplinary problems (such as labour market issues). This may partly explain the success of soft law strategies, as they emerged from the 'Employment Title', formally adopted in the Amsterdam Treaty, introducing the open method of coordination (OMC). What is seen, however, is that collective labour law does not actually stand in the front of these mechanisms.

The second option is the development of minimum requirements and conditions, i.e. the establishment of a 'floor of rights'. Both options can be taken in a view that the European social model should be built around 'shared values'.⁴⁹ It seems clear that this second road has reinforced collective labour law at EU level, in particular through the concept of fundamental social rights. Two major EU fundamental social rights documents illustrate this. When the drive towards more social Europe was heavily debated in the second half of the 1980s, the Heads of State of Government of the Member States (11 without the U.K.) adopted on 9 December 1989, in the form of a declaration, the Community Charter of the Fundamental Social Rights of Workers. It served primarily as a framework for European Community action, but nevertheless constitutionalised collective labour rights in the area of freedom of association, collective bargaining and information, consultation and participation of workers.

The other major example of has been worded in the conclusions of the presidency of the European Council of Nice (2000) where it was stated that the European social model, precisely due to the diversity of social systems of member states, rests on a common foundation of values. In the context of European enlargement and institutional Treaty revision, the road was open to adopt an instrument for fundamental rights, the Charter on Fundamental Rights of the EU, adopted on 7 December 2000.

Interesting is the way how, in the aforementioned 1989 Charter, rights have been formulated. With regard to social dialogue and collective bargaining, the 1989 Charter provides that: "the dialogue between the two sides of industry at European level which

⁴⁹ V. Spidla, The European social model: wishful thinking or reality?, Speech 11 May 2006, European Academy, Berlin, Speech, Document 06/291, 5 p.

must be developed, may, if the parties deem it desirable, result in contractual relations, in particular at inter-occupational and sectoral level” (section 12, par. 2). With regard to worker involvement, the 1989 Charter provides that: “information, consultation and participation for workers *must be developed* along appropriate lines, taking account of the practices in force in the various Member States” (section 17).⁵⁰

From the Charter went, in other words, a strong normative effect with regard to the necessary development of collective labour law, including at European level. The Charter also made an immediate address to the European Commission for taking legislative and other initiatives.

3.3. TURNING FUNDAMENTS INTO LAW

It can be said that only after the 1989 Community Charter of the Fundamental Social Rights of Workers, labour law (including the collective dimension) became really recognised. It is, of course, well-known that legal interventions in the area of (collective) labour law were first developed during the so-called ‘golden period of harmonisation’ in the 1970s. At that time, three directives were adopted that related respectively to collective redundancies (1975), the transfer of undertakings or parts thereof (1977) and the insolvency of the employer (1980). But these instruments were primarily intended to protect the workforce against the functioning of the common market. The rest of the 1974 Social Action Programme (but for sex equality) did not really come through. The primary action was, therefore, not as such on the creation of collective labour law. In later stages, the discussions on employee involvement in the company were nevertheless increasing, but the most famous proposal, the so-called Vredeling proposal, showed that it remained difficult to take a generally acceptable approach in this area.⁵¹

The great step forward was the adoption of the so-called ‘social chapter’ of the EC Treaty (first under the Maastricht Agreement). It gave new impetus to the creation of specific instruments in the area of collective labour law. European social dialogue received a boost. Under Article 138 of the EC Treaty the European Commission received an obligation to consult the social partners. Article 139 of the EC Treaty provided (and still does) that, should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements. Also the issue of worker involvement came back on the agenda. Article 137 of the EC Treaty allowed for the adoption of specific European instruments in this

⁵⁰ My emphasis.

⁵¹ Cf. R. Blanpain en F. Blanquet, *The Vredeling Proposal. Information and consultation of employees in multinational enterprises*, Deventer, Kluwer, 1983, 219 p.

area. The majority of secondary European collective labour law instruments cover the field of worker involvement.⁵²

4. EUROPEAN COLLECTIVE LABOUR LAW: FROM PRACTICE TO LAW

Above, it has been indicated that the development of (collective) labour law in Europe did come but after a strong impulse following the Maastricht (and later Amsterdam) Treaty amendments. It enabled the Union to take the step from policy to labour law. A quick-win conclusion would be that the legislative results remain limited. However, besides the Council based legal output, a broad range of industrial relations practices have come into existence. On European labour law, Bercusson has argued that, more important than the explicit European labour provisions, is their so-called “spill-over effect”.⁵³ European collective labour law, therefore, also requires an insight from the ‘law in practice’ on top of the ‘law in books’. It must be noted, indeed, that over time a strong interdependence has grown between policy, law and practice in the collective labour relations field. In the area of European social dialogue, the European Union has created various instruments which more or less provide an institutional framework for social dialogue. With regard to information and consultation rights, especially in the field of European Works Councils, specific mechanisms and processes have come into existence. All this may even create a need towards new (forms of) European legal intervention.

4.1. INSTITUTIONAL FRAMEWORK

When looking at the field of European industrial relations, it must be noted that the European Treaty framework has led to a particular institutional environment of industrial relations, especially in the field of social dialogue.

In essence, the social dialogue provisions (Article 138–139 EC Treaty) have been formulated in quite limited terms. But the provisions have laid the basis for European social partner voluntarism and autonomy. The inter-industry European social partners have used this principle of voluntarism to come to various forms of agreement. These

⁵² Council Directive 94/45/EC of 22 September 1994 on the introduction of European Works Councils. This Directive has been modified by the ‘Recast’ Directive 2009/28/EC of 6 May 2009 amending Council Directive 94/45/EC of 22 September 1994; Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community; Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society.

⁵³ B. Bercusson, *European labour law*, London, Butterworths, 1996, 504.

partners already had a social dialogue tradition, but it was continued and intensified under the Treaty. The social dialogue became more institutionalised and organised in committees for social dialogue. The European Commission took further initiative to also support the sectoral social dialogue. This impulse was supported by the Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level.⁵⁴

In addition, in the context of European employment policies, a specific institutional environment also has started to take form. Since the year 2000, a practice grew to organise a social summit in the margin of the European Council meetings, in order to allow the social partners to make a contribution to the integrated economic and social European policy strategy. With Council Decision 2003/174/EC,⁵⁵ a tripartite summit was formally installed. This tripartite summit is composed of representatives of the highest level of the acting and two succeeding presidency's of the Council. The summit is designed to make an effective participation of social partners in the economic and social policy of the Union possible.

4.2. THE DEVELOPMENT OF PRACTICE

It is important to note that the legal and institutional framework, with their inherent imperfections, have been able to promote a rather significant industrial relations practice.

It is well known that the social partners have concluded, on their own initiative, so-called autonomous agreements, like in the area of telework (16 July 2002), work-related stress (8 October 2004) and violence at work (27 April 2007).

As regards the European sectoral level, there are currently about 35 operating sectoral dialogue committees, in which in total about 300 agreements, conclusions, opinions or joint texts have been drafted.⁵⁶

Also at the level of European enterprises, a great deal of practice has seen the light. This is due, to a great extent, to the European Works Council (EWC) Directive. The European Works Council came into existence with the adoption of the European Directive 94/45/EC of 22 September 1994 on the establishment of an EWC or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.⁵⁷ Fifteen years after the adoption of Directive 94/45/EC, more than 800 European Works Councils

⁵⁴ O.J. 12 August 1998, L225/27.

⁵⁵ Council Decision of 6 March 2003 establishing a Tripartite Social Summit for Growth and Employment (2003/174/EC), O.J. 14 March 2003, L70/31.

⁵⁶ Cf. the EU database: <http://ec.europa.eu/social/main.jsp?catId=521&langId=en>.

⁵⁷ (94/95 EC) O.J. L 254/65, 30 September 1994.

are active, representing about 14.5 million employees with a view to providing them with information and consultation at transnational level.

4.3. THE CASE OF TCAs

A recent phenomenon concerns the issue of “transnational company agreements” (TCAs). The European Commission issued two major documents in this area. There is a Commission Staff Working Document (SEC(2008/2155) on “The role of transnational company agreements in the context of an increasing international integration”,⁵⁸ as well as the document on “Mapping of transnational texts negotiated at corporate level” (2008).⁵⁹ In these documents, TCAs are understood as “agreements comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers’ organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives”.

The new generation of texts, such as TCAs, emphasise that many legal questions still remain in the area of European social dialogue and collective bargaining.

It could be argued that a mature system of collective bargaining, and thus a fully developed area of collective labour law, rests on three important pre-conditions: a legal framework, an institutional framework, and an industrial relations practice.

It has been indicated above that the legal framework of collective labour law at the level of the European Union exists but with many shortcomings. A brief overview has been given of the existence of a relevant institutional framework, in which the social partners have been able to come to social dialogue and to conclude various agreements. It could be said that, taking into account its limitedness, a certain practice of labour relations has come into place. Both the institutional as well as the practical level of industrial relations have, in sum, developed in the shadow of a fairly limited legal framework.

This situation needs to be looked at from the angle of international labour law, in particular ILO Convention No. 98 on collective bargaining. It can be argued that, seen the three abovementioned pre-conditions of collective bargaining (legal, institutional, practice), the fundamental right of collective bargaining requires that every competent level of jurisdiction must install a sufficient legal collective bargaining framework, whenever a significant practice is developing. Especially Article 4 of Convention

⁵⁸ Commission Staff Working Document (SEC(2008) 2155), The role of transnational company agreements in the context of increasing international integration, Brussels, 2 July 2008, COM(2008) 419 final, 11 p.

⁵⁹ Mapping of transnational texts negotiated at corporate level, European Commission, Employment, Social Affairs and Equal Opportunities DG Social Dialogue, Social Rights, Working Conditions, Adaptation to Change, Brussels, 2 July 2008 EMPL F2 EP/bp 2008 (D) 14511, 37 p.

No. 98 is relevant where it provides that signatories have an obligation to take the necessary means “to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

It is quite difficult for the European Union, viewed as a consistent system of governance, to make a global claim for fundamental collective labour rights, such as the right to collective bargaining, while maintaining a regulatory framework with rather low impact internally. It would seem that the European Commission is aware of this idea. In a Communication of 12 August 2004, entitled “Partnership for change”, the European Commission stated that “in view of the growing number of new generation texts, the Commission considers there to be a need for a framework to help improve the consistency of the social dialogue outcomes and to improve transparency”.⁶⁰ As a consequence of this, the European Commission has issued a study on transnational collective bargaining and announced to consult the social partners with a view to the creation of a Community framework for transnational collective bargaining.⁶¹ The Social Agenda 2005–2010 explicitly refers to this ‘optional framework’ of transnational collective bargaining. It is, however, clear that it concerns a sensitive issue and it will require a lot of work and patience to receive the full support of all stakeholders, including the employers organisations, involved.

4.4. TOWARDS LEGAL INTERVENTION IN COLLECTIVE BARGAINING

The idea of an ‘optional framework’ of transnational collective bargaining, mentioned above, seems to hold a compromise between the need to proceed in the legal environment versus the problem of finding sufficient legal basis in the Treaty and political European consensus.

According to the *Ales Report* “Transnational collective bargaining: Past, present and future”, the legal basis could be found in Article 94⁶² of the EC Treaty.⁶³ “A possible only legal basis on which the directive could be grounded is represented by Article 94 TEC. We think that a directive offering an optional scheme for transnational

⁶⁰ COM (2004) 557final.

⁶¹ COM (2004) 557final, p. 12–13.

⁶² Article 94 EC Treaty: “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.”

⁶³ E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak and F Valdés dal Ré, *Transnational collective bargaining: Past, present and future*, Report prepared for the European Commission, February 2006, 36.

collective bargaining could provide additional opportunities for bringing closer social standards and harmonising collective procedures. We must recall that in the past such a legal basis served the purpose to favour secondary legislation aimed at avoiding distortions in competition. Albeit in a very different economic context, we feel that harmonisation still is an objective to be pursued in taking measures which affect both the economic and the social sphere.”

It may be questioned whether this route can easily be taken in practice. One may also wonder why the European social partners themselves could not make a transnational agreement governing European level bargaining. Such agreement could regulate the legal status of the European social dialogue result. It would thus concern a European agreement on European agreements, or a ‘meta-European agreement’, which could be concluded under Article 139 of the EC Treaty. However, an implementation via a Council decision could at best take place if the matter were covered by the text of Article 137 of the EC Treaty – which is problematic – and also the *ratio legis* would seem to prevent such Council decision on an agreement covering matters that are expressly excluded from this article. The ‘meta-European agreement’ would thus do not much more than what European agreements themselves can do with regard to determining, for example, their enforceability or legal status. But this may, again, suggest that European social partners could still do more in clarifying their mutual relationships under European collective bargaining processes as well as in defining more clearly the status of their mutual outcomes.

Another, often neglected, Treaty provision is Article 140 of the EC Treaty. It provides that with a view to achieving the objectives of Article 136 and without prejudice to the other provisions of the Treaty, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to labour law and working conditions and the right of association and collective bargaining between employers and workers.

Self-evidently, this is not a basis for a hard regulatory approach. But a coordinating framework inspired by European Commission initiative may prove to be useful in a legally still unclear context. There remains a weakness however, within Article 140. It explicitly refers to the fact that the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations. This at first sight limitative approach, does not seem to leave room for much autonomous European initiative.

5. CONCLUSIONS

The world of work is changing. Under the rubric of ‘modernisation’ it calls on labour law to reflect about its role and functions. As such, a reflection would appear as a good thing. Labour law should be responsive and take into account the context and realities of labour relations. But labour law also needs to set out beacons. In that respect, it is important to remain critical in the modernisation debate. This debate would seem to sometimes overlook the role of collective labour law. In this contribution, therefore, an attempt has been given to provide some insights into the future of collective labour law in the 21st Century. In particular, the emphasis was on the European dimension and on the question whether Europe can give a future to collective labour law.

The problems of the limitedness of the European regulatory framework have been indicated. But the analysis shows that there is still a need for European clarifications or even interventions in the area of collective labour law and industrial relations. There are many reasons to keep the debate about developing European collective labour law alive. It would be too weak to merely conclude that the political setting does not allow much progress. A reinforcement factor is the international fundamental rights environment of the collective labour area. A new generation of practices can be found at European level. The phenomenon of transnational company agreements (TCAs) are a proper illustration. They trigger various legal questions. The European Union seems to be conscious about its role as well as the challenge. A need for EU intervention would therefore be defensible. A traditional hard law intervention would, it seems, be too optimistic. But new modes of regulation, through open coordination processes, used in other policy areas, may also happen to be the best steps forward in the domain of collective labour law. There is some room in Article 140 of the EC Treaty to do this. This should be combined with further European social partner initiative. Regulatory diversity – fitting responsive and reflexive (labour) law concepts – seems to be the most defensible way ahead. For if one founds the future of the European Union on an idea of social governance, it would appear proper to give the European social partners as well as the European legislator room to play their respective roles in the future of collective labour law.